IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL ACTION 2:07-cv-5619-SDW

MICHAEL VOLPE,	:	TRANSCRIPT OF PROCEEDINGS
Plaintiff	:	M O T I O N
-vs-	:	Pages 1 - 92
DANIEL H. SCHULMAN, et als,	:	
Defendants.	:	

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Newark, New Jersey
March 9, 2009

B E F O R E: HONORABLE SUSAN D. WIGENTION,
UNITED STATES DISTRICT JUDGE

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Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above entitled proceedings.

S/Carmen Liloia
CARMEN LILOIA
Official Court Reporter

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THE COURT: All right, counsel. This is the matter of In re Virgin Mobile, and it's civil action number -- it's part of multi-district litigation, but the civil action number for New Jersey's purposes is 07-5619.

I do are your sign-in sheet. Let's proceed and have everyone enter your appearances and we'll get started.

MR. CECCHI: Good morning, your Honor. James Checchi, Carella Byrne, on behalf of the Plaintiff. This morning with me is Kim Miller and Melissa Clarke from Kahn Gauthier Swick.

THE COURT: Good morning to all of you.

MR BEYER: Good morning, your Honor. Jeffrey Beyer from the law firm of Drinker Biddle & Reath, local counsel for defendants Virgin Mobile, Corvina and the individual defendants, other than Douglas Lynn. With me here today is co-counsel from Simpson, James Gamble and Christopher Lucht.

THE COURT: Let me maybe sure. Mr. Gamble, you're number one.

MR. GAMBLE: Well, I'm going to argue, at least.

THE COURT: All right. You're number one. Go with it. You know what I mean? If you get it, go

MR. GAMBLE: Thank you, your Honor.

THE COURT: James Gamble. And, counsel, the second seat, I'm sorry?

MR. LUCHT: Christopher Lucht, your Honor.

THE COURT: You're L-U-C-H-T?

MR. LUCHT: That's correct, your Honor.

THE COURT: L-U-C-H-T. All right.

And who's next?

MS. MULLIGAN: Good morning, your Honor. Sally Mulligan from Lowenstein Sandler PC on behalf of the defendants SprinT Nextel and Douglas Lynn. And I'm here with my co-counsel, Robert Micheletto of Jones Day, and his colleague Bronson Bigelow from Jones Day.

THE COURT: Good morning to both of you, Mr. Micheletto. Am I correct "letto"? That is an O at the end of that?

MS. MULLIGAN: It is.

THE COURT: All right. And let me just get counsel, also from Jones Day. You guys signed up. Counsel, what's your name, I'm sorry?

MS. MULLIGAN.: Sally Mulligan.

THE COURT: You're other colleague.

MR. BIGELOW: Bronson Bigelow.

THE COURT: You're way back there. I thought you were introducing the woman that's there. All right. Bronson Bigelow.

And, of course, I know you. All right, Mr. Greenbaum.

MR. GREENBAUM: Good morning. Jeffrey T. Greenbaum, Sills Cummis & Gross for the underwriter defendants. With me here today is Susan Sultzstein and her colleague William

O'Brien from the Skadden Arps firm.

THE COURT: Excellent. Good morning to you guys as well. You have enough room back there, counsel? You all right? Want you to be comfortable. I have a feeling we'll be hear for a while and I want everyone to be comfortable.

We do have three applications pending essentially for the same thing. It's a motion to dismiss before the Court. I have read the written submissions that have been provided to the Court. I wanted to give counsel an opportunity to be heard orally, which is why we have scheduled today's hearing.

So with that being said, I'm going to -- I don't know who filed first, quite honestly. It doesn't really matter for our purposes, but I'm going to start with you, Mr. Gamble, I'm assuming you're arguing.

MR. GAMBLE: I think that's right.

THE COURT: See, number one

MR. GAMBLE: Your Honor, I'm going to speak a fair amount from this presentation, and I notice that we have two folks who are sitting on this side of the room, who won't see it very well. Is it all right if I hand them copies?

THE COURT: They're interns. You're more than welcome to. They're very special.

MR. GAMBLE: I can hand copies to anyone else. Would you like one?

THE CLERK: Yes, please.

THE COURT: Do I have one, counsel?

MR. GAMBLE: No, but I can hand you one.

MR. CECCHI: You don't need it.

THE COURT: I don't need it, right, Mr. Cecchi.

MR. GAMBLE: The first time I gave a presentation they told me you shouldn't pass it out at the beginning because people will flip through.

THE COURT: We had that discussion in chambers, but I like it.

MR. GAMBLE: You're going to decide. I just assume you flip to the end, the conclusion is good for us.

THE COURT: Okay

MR. GAMBLE: Your Honor, I'm going to go to the first slide here which starts in an optimistic place, which is what we agree on. I'm going to note I have 31 slides, and this is the only one that talks about things we agree about. So I don't want -- I want to have full disclosure that it's not going to go necessarily quite as easily all the way through. I think these are important points.

The first think we have is the Rule 8 applies to many, not all, but many of the plaintiffs' claims. Plaintiffs have argued that we're looking for a 9B standard on all of their complaint. We are not. I'm going to get to the specific claim. I think 9B applies to later on, even there I will say that they haven't met the Rule 8 standard, so I won't talk a

lot about it, but I want to be clear about that.

THE COURT: Okay

MR. GAMBLE: The second thing we agree is Section 11 does not impose a scienter requirement. We're not arguing anything different than that. The law is quite clear on that. However, however, I do want to be clear that plaintiffs' claims of a failure to disclose a material trend do require plausible allegations of knowledge because of item 303 of SK, and I will get to that specifically as well when we get there.

The third piece, the Court has to consider the entirety of the documents on which plaintiffs rely, which means you don't just look at the four corners of the complaint in the case like this, you also have to look at the prospectus, you have to look at SKs to which they cite because here context matters.

And in the last point is that loss causation is an affirmative defense under Section 11. And we are not moving to dismiss for failure to plead loss causation, that is also one of the plaintiffs arguments, and we are not going there. So, again, loss causation is not part of our affirmative case here. Okay.

So now let's talk about what's required to satisfy Rule 8. The plaintiffs' first argument is that they can survive the motion to dismiss so long as, and this is a quote, "under some set of facts consistent with the allegations" they

can recover. But the law is the Supreme Court rejected that standard in the Twombly case, and the new standard is that it has to be more than merely conceivable, which I think is what sort of is any set of facts standard really applies, or some courts use it for it has to be more than really conceivable. The Court has to nudge it past the conceivable to a place where it's plausible on its face. I think that the Third Circuit has ruled on this in a way that's very helpful.

The Phillips case and the Burlington case picks up on this, really defines this in a way that courts very commonly do make decisions on motion practice decisions in a matter of law, and that simply is it has to be a reasonable reading.

Now, I believe the other thing that the Phillips case makes very clear that's important is the context matters, in Phillips what that meant is the court actually looked at the fact that it was a Sherman Act case and read the pleadings in light of what the Sherman Acts' intentions were, as well as read the pleadings in light of all the surrounding facts.

Here, what I think that the teaching of Phillips, that context matters means is that you need to look at this in the context of the overall Securities Laws, and the way the Securities Law have developed and are developing. And the key point there is that the Securities Law in general, much more so than virtually any other body of law we have, are designed to permit courts to weed out meritless complaints at the motion to

dismiss phase. There's a lot of case law that describes this. There's a lot of scholarship around the Section 10B claims in particular on the private Securities Law format that talk about the fact that the laws really are designed to allow those claims to be weeded out, and that's because discovery in these cases is extremely in intrusive and completely expensive, so courts don't want to have the interim effect of discovery to create settlements that aren't ultimately fair.

I think, your Honor, what does Section 11 means essentially and the simple statement, just what's quoted here, and this is an omissions case, so I'm going to skip to the omissions part of it which says: If you're going to plead an omission, you have to plead that there was a material fact omitted or -- sorry, an omitted state of material fact required to be stated therein. That means they're under a duty because it's specifically required or necessary to make statements therein not misleading. Simply put, if plaintiffs haven't alleged a material omission, they haven't alleged a claim. To adequately allege an omission, the plaintiffs have to plead that there was a duty to disclose the omitted fact. Okay?

Well, whether a duty exists is determined by, and I've cited here a Panther Partners case. There are other cases cited in our brief, but essentially -- the essential rule is whether a duty exists to disclose is determined by the itemized disclosures that are required by the Securities Laws and

regulations had are promulgated thereunder.

Well, here's where we get to I think sort of what is at some level the crux of the case. Where the allegation is a failure to disclose a material trend, there's a line of cases, Shaw starts it, Turkcell picks it up. There's a number of other cases that follow it -- again, they're cited in our brief -- that say where you're alleging a failure to disclose a material trend, what you have to allege is the trend was known, which I'll talk about the fact that they haven't done that well here, but that's really not going to be the crux of my argument today. That's in the papers. Now, the crux of my argument is going to be extreme departure part of the standard, and that is, unless this trend that you're claiming was -- the company failed to disclose was an extreme departure from the range of results which could be anticipated based on currently available information, it's not a material omission.

Now, the plaintiffs' actually acknowledge that item 303 limits disclosure obligations to known trends that are extreme departures. But I believe their argument, as I understand it, is that they don't have to plead a violation of 303. Because the defendants were, and here is a quote from their opposition brief, were "also obligated under other duties of due diligence and disclosure to disclose material omitted facts."

I think what they're essentially saying is when

there's a general obligation not to omit material facts, and I think they're missing the point I believe what the Shaw and Turkcell line of cases says, if you want to understand what constitutes a material omission when you're talking about a trend, when you're comparing things period to period, okay, when you're talking about a trend, how you know that something is material and needs to be disclosed is that it meets the 303 standard, or meets the standard that's set out in Shaw and Turkcell.

The key point, your Honor, is that it's not a separate standard. There's not the general material omission standard and the 303 standard. The explanation of 303 and the regulation itself defines what's material in this context.

Okay, context. The plaintiffs' case in large measure comes down to one thing, and that is, that the company on November 15th, announced what they call shockingly poor third quarter results, which I will later tell you are certainly not shockingly poor, but the plaintiffs state that there was a disclosure on November 15th of what they call shockingly poor third quarter results.

I also want to, and this is a quote from their papers, and it says, "and fourth quarter guidance." So we announce both third quarter results and fourth quarter guidance on November 15th. And then the company stocks dropped 30 percent the next day. That's essentially the argument. The argument

is, I think, what the plaintiffs -- what we're alleging that the defendants failed to disclose must have been material to the market because stock prices dropped by 30 percent. Well, this is context. Okay?

Now, the Court's entitled to take account of closing prices on the stock market in a motion to dismiss like this. That's a matter of public record that you guys -- you're absolutely entitled to look at. What I put up here is just a chart, and this chart does it, actually tracks the stock price from essentially the day of the IPO, that little yellow line is intended to be November 15, and then it goes on further than that.

What -- this is really here to show your Honor the decline began well before any allegedly quote unquote corrective disclosure, so it couldn't have been based on what they claim was a material omission because, according to them, the market wouldn't have known about those material omissions quote unquote until November 15th. The stock price decline was well under way by then.

I also have to note, and this is a technical term, that it's going down in a way that's spiky. By that all I mean is it's highly volatile. And so the mere fact of a volatile or spiky drop and/or around November 15th doesn't tell you very much and it particularly doesn't tell you very much because of the fact that the plaintiffs also allege that on November 15th,

in addition to talking about our third quarter results, we talk about our fourth quarter guidance. And there is, I don't believe, any allegation that the prospectus itself contained any prior guidance, that there was any duty to give guidance. And the law is very clear, there is no duty to give guidance or publish interior projections, so that has to be a separated piece, and that's a piece of context that matters.

I want to again just really reinforce for the Court that looking at the context, looking at information like this, is entirely appropriate on a motion to dismiss in the securities class action. You can look at securities cases that are detailed in our brief, and you can look at Chubb. You can look at the N2K cases, Garber v. Legg Mason, Shaw, Turkcell -- again, all in our brief. If you read those cases, your Honor, what you will see is in each case the court goes through a detailed analysis of the prospectus of the claims, and goes sometimes line by line and does an analysis and asks itself, okay, what have we -- you know, is this in fact alleging a material omission. All done on motions to dismiss, entirely appropriate in this context.

THE COURT: Let me just understand your chart, Mr. Gamble.

MR. GAMBLE: Sure.

THE COURT: The chart has down there -- so the November 30th, 2007 date at the top, what is that referring to?

MR. GAMBLE: I'm sorry?

THE COURT: It's right under -- where the chart square begins. It says Virgin Mobile U.S.A., Inc and the New York Stock Exchange, that section.

MR. GAMBLE: I think the November 30th date, and I'm going to turn around and look at my colleague here, that would be the date that we printed this off. So that's not actually relevant to the dates on the chart, I believe.

THE COURT: Okay

MR. GAMBLE: If you look, there's a center line that says November 5. So you go back at the bottom, it starts around October 10, October 15, October 22, October 29, beginning in November, 5, 12, 19, 26.

THE COURT: Right. So the stock is rising up until the point of the IPO. Right?

MR. GAMBLE: Well, there really is no stock up until the point of the IPO. On the date of the IPO, it sort of jumps up and pretty much starts down in the next day or two I believe it starts down.

THE COURT: Okay.

MR. GAMBLE: One of the plaintiffs' argument is the chart I just put up is only important in considering loss causation. I already said we're not arguing loss causation, but I don't think the plaintiffs are correct. I believe what the law is, the context is important because the plaintiffs

have to show there were material omissions. And the plaintiffs' only allegation to support that the alleged omissions were material is the stock drop. The context shows that plaintiffs' allegations can't be credited, even on a motion to dismiss, because the stock drop isn't in any way coincidence with what they claim to be the omissions. And I also want to again stress the fact there is that fourth quarter information that's in the same place.

THE COURT: But I think part of what they argue is that two weeks prior to the IPO, there was information relating to this third quarter, and the fact that profits were down, et cetera. And that wasn't disclosed. So --

MR. GAMBLE: Your Honor, you know what, this is, since you've asked the question, let me get to it now.

THE COURT: I'm probably on slide 40

MR. GAMBLE: Well, no, I only have 31, so not 40. But you're about the middle of the thing, and I'll get to it in a little bit more detail. Since you asked it, let me get to it.

THE COURT: Okay

MR. GAMBLE: I think you're right in the sense the hardest question for me to have to answer is, okay, I get the fact that maybe there's no duty to disclose future projections, but what the plaintiffs are really arguing is: Hey, these aren't future projections. You are making comments about the positive state of the company, and at that very time you had in

your possession information about the third quarter that was essentially inconsistent with what those statements were. And even -- at some level I suppose the plaintiffs could be saying: Even if it's inconsistent, even if we told them, as we did, we expect our expenses to continue to increase, or we expect our rate of net subscriber to decrease over past periods, even if I told you I had that prospective, but in fact it wasn't an expectation, I knew it to be true, am I not misleading you. I think the answer to that, your Honor, is, to my mind, really, really clear. And I actually thought about this as I was preparing this morning because I thought: Maybe I'm making this a lot more complicated than I have to. My point is simple and I'm going to use the example of the net subscriber additions, which I'll get to later, and show you there are a disclosures saying net subscribers went down from 2004 to 2006, year on year. We expect them to continue to go down, explaining why we expect them to continue to go down. And in fact they do go down. And the point I think is pretty simple. If you show investors in your prospectus that net additions have been decreasing for several years, and you tell them you expect that to continue, you cannot possibly be guilty of misleading those investors when in fact what you told them you expected to happen, actually does.

Now, even if you assume, you already knew that the disclosed trends of declining adds had continued in the third

quarter, when they said in the prospectus they expected them to do so, that continuation of an already disclosed trend doesn't trigger an interim reporting obligation. And the reason I thought it was really worthwhile addressing this in detail here instead of asking you to wait until I got to it later is that's a key point here, the Securities Laws have a disclosure program set up. You're suppose to disclose every quarter, and then annually in your 10K. And, yes, you can go to the market in between. There is no generalized rule in Securities Law that says: When I put out a prospectus, I have to bring down my audited financial statements to the day of my prospectus. That doesn't exist, and in fact as a practical matter, it just couldn't. Companies don't work that way. Auditing doesn't work that way. It's not possible.

So what you have to do then is define when does an interim obligation arise? What is it that's sufficient to trigger the need to stop in the middle one of those quarters and say: You know what, I think we better stop and tell people something because we can't wait until the actual 10Q to be filed. That I think is what Shaw and Turkcell is about, were it an extreme departure standard. And I'll talk a little more about the extreme departure standard. The fact is, I really looked at the stuff this morning when I thought about it. I don't think I have to get to extreme departure. What I'm saying to you flatly is that if I tell you that in the past my

net customer additions has gone down, and I tell you I expect it to continue to -- in fact before my 10Q is out, I know in fact, heck, look at that, it did, doesn't mean that on the day that I say, gee, look at that, it did, I have to tell you. It means, everything I've told you before is still right. It just means that when the time comes to actually do my disclosures where this particular piece of information is necessary and appropriate to disclose because I'm hitting that period's results, that I have to do it then. That's really what I think the key answer here is, your Honor. Yes, the extreme departure standard is, I think, the legal framework in which this fits and I think what I'm saying is in a case like this where the disclosures are so clear, and in fact all the company is doing is following an existing trend rather than departing from it, I think what you really have to look at is, say, whatever it is that triggers that interim obligation, this clearly isn't it.

Let's go to the next slide. To go back a little bit to the standard and why context matters so much, your Honor. I think the Chubb case is a 9B case, and I want to be clear about that. It also talk about Rule 10B, but then it describes Rule 11 as well. And I think it's -- what they say in Chubb is important. We've been clear that fraud cannot be inferred merely because at one time the firm bathed itself in a favorable light, but later the firm discloses that things are less than rosy. We have long rejected attempts to plead fraud

by hindsight.

So the mere fact that I said something was good at one time and it turns out later that it's not, that in itself does not give rise to a claim. Granted that it's a 9B case.

I want to look at Castlerock, which is a District of New Jersey case from this court, where the court actually adopts the Shaw standard and Turkcell, and it's a case that actually has a lot on point with this cases, the Castlerock case does. And that court says "that liability cannot be imposed on the basis of subsequent events is no less the case when a plaintiff proceeds under a negligence theory." In other words, fraud by hindsight isn't defined because of 9B. Fraud by hindsight is something you just can't plead because by hindsight, it's not a material omission.

THE COURT: They say they're not pursuing fraud.

MR. GAMBLE: They saw they're not pursuing fraud.

THE COURT: Right.

MR. GAMBLE: Well, I think what Castlerock is saying, you can't plead in a sense negligence by hindsight either, that what you have to show essentially is that the statement, and you can look at the text of the law, was untrue at the time it was made. That you can't simply say: Well, things didn't work out as well as we thought that they should. That you actually have to prove that something was untrue or was materially omitted at the time the original set of statements were made.

Here, at the time of the prospectus. I think that's really what this stands for. It's not necessary that you get to fraud. I think that's what I'm saying Castlerock really stands for.

Now, I've talked about this a little bit already, but the plaintiff do argue that we're raising factual disputes that aren't properly determined on a motion to dismiss. The law is that issues like this are routinely decided as a matter of law. I've noted two cases, the Trump case and the Burlington Coat Factory case. Again Burlington Coat is a 10B case. Again, it doesn't really matter in this context, they are courts deciding issues of what's material, what's not, what's an omission, what's not, after a thoroughly detailed analysis of both the proceedings and the prospectus, itself, and other companies' ancillary disclosures.

Now I get to the specifics. For all of these, your Honor, I think the short answer is on the specific three buckets of what I think really are the crux of their claims, which is there was a widened financial loss, that expenses were increasing, and that our net subscriber additions were decreasing. The rate of net subscriber additions were decreasing. All three of those, the answer at this point is pretty short, which is: All disclosed. It's all in the prospectus. The fact that that was happening and likely to continue is all in the prospectus.

Let me get to it with a little bit of more specificity. The widened financial loss is probably the one that's a little bit different than that, but basically the same. Because what the plaintiffs essentially claim is that the prospectus was untrue or misleading because we didn't tell people that the third quarter showed a widened financial loss. Again, I'm not dealing a lot with knowledge here. I don't think the plaintiffs have met the knowledge standard. We've talked about that in our brief. But I'm going to skip over that and say I don't concede it, and I'll rest on the papers for that because I want to talk about the departure standard.

Here, I don't even need to get to knowledge in the first instance because if you look at the actual document that reports this allegedly widening financial loss, here's what it says. Then the third quarter of '06, and what the plaintiffs do is compare the third quarter of the '06 loss to the third quarter of '07 loss, and they do that because we have a Virgin cyclical business, you know, the fourth quarter people buy telephones for Christmas. There's a lot of costs associated with that. But then, because the substantial base increases, that revenue ramps up later in the year. So there's a lot of seasonality here. They compare quarter on quarter.

When we disclose our third quarter '07 results, we make the point, and this is also disclosed in the prospectus because they're doing it on an annual basis, it's a little more

complicated. It's primarily the basis of a one-time 11.4 million dollar favorable impact on the third quarter '06 associated with the reversal of an accrual for settlement.

So absent that, okay, absent that favorable impact, essentially we had a litigation reserve up, and we released it because we had a better settlement then we thought we were going to get. Absent that, the actual clause in Q3 is 16.5 million dollars in Q3 of '06. VMU lost 7.3 million dollars in Q3 of '07. Apples to apples. The lass declined, it didn't widened. You can say: Gee, the technical gap number of 5.1 is also reported there, couldn't an investor think that was the important number as opposed to it on what I've called an apples to apples basis? I think the short answer to that is no. That you have to take this in contention. You have to look at the full disclosure, and while 5.1 is maybe the line item that GAAP had them put up there. GAAP is a package of rules, and it does require additional disclosure to round specific numbers. And the fact that we also disclose the content, the quality of the earnings number, is something that an investor would take into account. And, again, when I say that, I can almost hear the wheels grinding behind me saying: Ah, an investor would take into account. I point the Court to Garber v. Legg Mason. The Garber vs. Legg Mason. Legg Mason is an asset manager. And they acquired Citibank's asset management business. It was a very large merger. Citibank -- after the merger, but before

Citibank did a secondary offering, so there was a Section 11 component to this, before Citibank did the secondary offering, one of Legg Mason's sort of superstar asset managers came to them and said: You know what, guys, I'm going to leave. I don't like the combined entity, I'm going to take off, and I'm going the take 8.5 billion dollars of asset management with me. And that was acknowledged by all parties that Legg Mason knew that before the prospectus went out for the secondary offering. And the Court in Legg Mason found that's not material as a matter of law. That's not material. Why? Because in a context of a merger, any reasonable investor would understand that the departure of some employees is not only possible, but likely.

And I think what you have to say is the same thing here. You don't have to reach far, but you do have to acknowledge that a reasonable investor, somebody operating at all in the market, is not just going to look at a bare number. They're going to look the entirety of the statements around it and they're going see that 5.1 billion, that that contains 11.4 million dollar release of litigation reserve just as a going forward basis. You would look at that and you would have to take that into account and make an investment decision. I think you have to understand an investor would take that into account here.

Again, all I'm saying here, your Honor, is that under

the law, that the Court can't credit allegations that are actually inconsistent with the very documents that they rely -- the plaintiffs rely on. And here, since the plaintiffs haven't pled a widened loss, there can't possibly be a material omission. And that takes us to their next allegation, which is the registration statement is misleading because it omits to disclose that the company -- the third quarter results showing significantly increased expenses.

Now, this is what the prospectus says. Cost of services has gone up by 28.6 percent for the six months going -- for six months of the year '07. Cost of the equipment has gone up for the same six months by 22.4 percent. Selling, general and administrative expenses, up 17.1 percent up. That's all in the prospectus. What is that saying? Our expenses are increasing.

If you look at this chart, it's actually in our brief. I'm not going to spend a lot of time on it, but what you look at when you look at it, it shows you that in fact the six months that are disclosed. Then if you look at it over the nine-month period, that includes our third quarter earnings that are announced on November 15th. The numbers are extremely consistent. A little bit of an uptake in cost of service. Actually the cost of the equipment. And the SG&A expenses go down.

Now, what plaintiffs have said about this in their

opposition brief, which is an argument not in the pleadings at all, but it's in their opposition brief as well. Yeah, but you know, before your increased expenses were all because you were adding subscribers so fast. And that meant you spent money on hand sets and other things. And here you had declining net subscriber additions, and so that, that means it's a different reason, and the fact that it was trending downward -- that your expenses were continuing to increase, even though you weren't adding subscribers, well, that's different, and that it's a substantially different fact, and that you had to disclose.

I think here they just got the analysis wrong. And this, again, if you look at the cases, you'll see this is exactly the kind of analysis courts do. The primary expense, I think, that is associated with adding customers is the new phone. I'm sure that there are also network charges and other things that have to be built up, although because Virgin is virtually a network, it's not going to operate as somebody who has to build sell towers. I need to get away from that because, I don't know, you have to talk intelligently.

One thing I do know, particularly in the cell phone business at this time, one of the things you did when you put new subscribers on board you have to subsidize the purchase of a phone, a hand set. Well, if you're going to look at increasing expenses based on the number of subscribers you add, you don't look at the net number, because the fact that

somebody decides to drop your service, you don't get the money back that you subsidized them for the phone. Right? It's gross additions that matter.

And one of the things you'll see when they talk about the net additions number, that gross additions in the third quarter of 2007 actually went up fairly considerably. So their argument is just inconsistent with the fact, because what you have to look to is, well, did our expenses continue to increase because we are continuing to add subscribers on a gross basis, not a net basis? I think that it's the correct explanation. I'm not sure you even have to get there because I think their argument in their brief, which is clever, is not supported by any of the allegations in the complaint. So I believe it's unsupported and would be dismissible on that basis anyway. But I think if you actually read the prospectus documents, it's also inconsistent with the prospectus documents and so would be -- would not satisfy Rule 8 because of that.

Okay. Decline in substantial growth rate. We have spilled more ink on that then I think on any other argument in the papers. I've already spoken with you about it to some extent because I did that in the context of the difference between -- what does it mean that this was in the plaintiff's view at least a present fact that we failed to disclose as opposed to the future. But just to go through it a bit, the plaintiffs claim that the registration statement was materially

misleading because we didn't disclose that the third quarter had a significant decline in substantial growth trends, that's the way they phrase it. I want to be clear, what they're pointing to is what they call net subscriber additions. These subscribers is the total number of people you sign. Net is people you sign, the less the people who leave. What you have to see first is that on the prospectus, at page 79, we'll go to a chart that we've got in here, and this is actually -- it's excerpted from the prospectus. There's more information in the prospectus charter than this. This is a line item and it's shown. So if you look in the offering documents, it actually says in '04 our net additions were 1.4 million; in '05 they have 900 something some thousand. And '06, unaudited statements, for '06 there 730,000. You see a fairly significant decline here in the range of 500,000 -- 30 percent from '04 to '05, another close -- another about 30 percent from '05 to '06. Significant decline.

Not only that. But the prospectus also says -- it explains the trend. It says, 'we believe that a decrease in the rate of net customer additions, as seen in our 2004 to 2006 annual performance," so they're actually pointing people to that fact, "is typical of the effect of customers switching providers," which is what the company called churn, "on an increasing customer base." That is, as more people get to be more savvy, they change telephone operators. Our net numbers

are likely to go down. They also say: "We expect growth in customers and penetration to continue at lower rates than previously experienced in the industry."

It would be pretty hard for it to be more on point than that. They're basically saying: We expect our net customer additions to go down, and that explains why. One of the reasons it explains why, again, I hesitate to do this, given the length of prospectus, but I really do commend the Court to the discussion, and the management discussion, and analysis, and the risk factor section of the prospectus. They are really very full and frankly excellent examples of how a company is suppose to go through and disclose the risks associated with investing in a first-time public company. But the prospectus actually describes a number of issues.

But here's I think a very representative one. It says: "Most of our competitors have substantially greater resources than we have." We're obviously competing with Verizon, AT&T, and others. A lot of resources there. And as consolidation, the industry creates even larger competitors. Our competitors purchasing advantages may increase further, hampering our ability to attract and retain customers. So then what they're saying is: Look, you've seen it. You've seen the net subscriber additions go down. We're telling you to expect them to continue to go down. And a part of the reason at least, or a part of the reason that may happen is we have

competitors with an awful lot of wherewithal, and what goes with this is all that money muscle, we may not be able to match it.

And this, your Honor, means I won't repeat what I said before. This is the item 303, essentially, that the trend has to be an extreme departure. Given the disclosure I just talk about, it would be impossible to see this as any kind of departure because it's the same trend, let alone an extreme departure, given the disclosures. And take us back to the last line I think for a second. I think that's it, your Honor. I believe I sort of covered that to some extent. If we go onto the next page, it's a little bit more detailed description of Shaw, which essentially says, you know, "a company is not required to disclose interim financial results whenever it preserves a possibility that the quarter's results may disappoint the market.' I believe that's a powerful and important phrase. And it adopts the standards that interim results are disclosable only if they're a known trend or extreme departure. Turkcell adopts the same. And there's just no way for the plaintiffs to plead around this or argue their way around the pleading requirements, is probably a better way of saying it.

Take a look at the next page, your Honor. What I tried to do is anticipate the question. Okay? Extreme departure is a standard. How do I define it? What does it

mean? And I've always wanted to use this example for something, and it finally fits something really well.

THE COURT: I'm glad.

MR. GAMBLE: In high school chemistry class I had a teacher who explained to us the Rutherford's foil scattering experiment. It's an experiment where this physicist fired elementary particles through gold foil. And based on the way they came, it inferred from that the actual shape of the atom, which is kind of cool. Our chemistry teacher in high school explained it by the following. Took a shoe box, painted it black, and on the back wall of the shoe box he pasted a hard object that looked like a star. And then he sealed the box up so you couldn't see in it and he showed it to us and said: What's in here? We all said: I've no idea. It's a black shoe box. And he put it on a stand and he fired BBs at it, a whole bunch of BBs. You probably wouldn't do that today because of the liability.

THE COURT: Was just thinking that, that wouldn't work today. You're a classroom where he fired a BB?

MR. GAMBLE: He did it outside. What he did -- then he showed us the front box and we said: What is it? We have no idea. It's a bunch of shots in the front of the box. And he turned it around. We said: Oh, it's a star shape on it that a BB won't get through. You can see so many things that popped out around the star, but nothing could get through.

It's a long way to explain how the Common Law works, like generally you sort of have to look at the cases and see where they go through and make a decision about where you fall.

The reason I'm using that example, I think, your Honor, is I think what we're talking about here is Virgin Mobile is right dead center, that star shaped object. If you take a look at this chart, what I've tried to do is first I have a wonderful quote I think from Shaw which is: "There is always some risk that the quarter in progress at the time of the an investment will turn out for the issuer to be worse than anticipated. The market takes this risk of variability into account." Very much like the comment I made about the Garber case earlier, where the Court said: Look, people understand in merger some of the employees, maybe even important ones, are going to leave. You can't call that misleading. This is essentially what the Court is saying.

Now, in Shaw the Court actually found an extreme departure. It did a detailed walk-through of the prior disclosure, prior period disclosures, and it said: Look, there were a 183.1 million dollar net loss in this quarter. It was far greater than analysts expected. The Court assumed knowledge here. I don't know if there was a debate in the decision. The Court says it assumes knowledge, and it was at largest loss since the first quarter of 1983. And I'd have to go back and look at the dates on this, but that's within --

it's a couple of years. The Court says: That's enough. In the full context, that's not enough to really describe the analysis the Court did, but that's the flavor of it.

Then we go to Turkcell, and the Turkcell court said: That's not enough to plead an extreme departure. And in Turkcell is a 9 percent decline from Q1 to Q2 in a phase of a prospectus that actually showed a history of rising profits. The prospectus here is issued after the second quarter is over, very much like our facts after the second quarter is over, it shows a 9 percent decline in net income when the prospectus showed a history of rising profits. But the Court said: There's no decline in other indicators. There's other disclosures around this. This isn't enough to show an extreme departure. It's not enough to show. You got to drop off the Securities Law reporting scheme and report earlier.

So Virgin Mobile, if you look at Virgin Mobile, now we've talked about the widening loss point. I'm not going to go back to that. But what they're really focussed on here, from a net addition point of view, yeah, there's a 52 percent decline of net adds in one quarter of the year. But there's a 13.9 percent increase in gross adds. This is the point I made before about expenses in gross adds in the same quarter. For the full nine-month period, it's 161 percent increase in the net adds, and the prospectus actually says that the growth in customers is expected to continue at lower rates than

previously experienced.

So where does this take us? Here's the conclusion that I reach out of this, and I think the Court should reach. First, the focus in the prospectus, if you look at this in light of the focus in their prospectus on the year-to-year changes in net adds, rather than the quarter's prospectus. If you look at this, it disclosed a downward trend in subscriber adds from '04 to '06. If you look at the increase in subscriber addition rates for the first nine months overall of '07, and the prospectus disclosure, that subscriber addition rates are expected over time to decline. They're just is no material omission. Because a one-quarter decline in substantial growth numbers can't be seen as a trend that was in any way an extreme departure from what could have been anticipated. As I said before, it's not even a departure, let alone extreme.

I will also note that the plaintiffs have not adequately pled that the defendants knew the substantial growth numbers for Q3 at the time of the IPO. I believe, just going to flip through here, your Honor, and make sure I can skip what I'm looking at. Okay.

This maybe the other thing we spilled a lot of ink over, an issue of confidential witnesses. I think the only way plaintiffs have of complaining -- the only thing they try in their complaint is to claim, well, they must -- they knew. In

part, they say: Well, they must have known because the quarter had ended already, and I believe the law is pretty clear that all by itself isn't enough. I think what they do say is, well, we have these confidential witnesses who make statements about the state of the company at the time. And I'm going to say flatly the confidential witnesses here are simply not identified well enough, and their statements are not sufficiently specific to be meaningful at all in this context. And I'm going to point the Court to the Chubb case. The Chubb case in the context of its 10B analysis goes through in great detail what it takes to make a confidential witness meaningful. But I want to be clear that Chubb also rejects the Section 11 claims that are based on the same set of allegations. And it does so essentially on the strength of the exact same argument that it relies on for 10B. So effectively it applies the same analysis, the same standards to the confidential witnesses under Section 11 because essentially when it rejects the Section 11 arguments, it essentially says in a little bit longer form, for all the reasons that we discussed in the context of our 10B argument, the plaintiffs' claim under Section 11 fails as well. And so the confidential witness standard I think the Chubb court is saying is the same.

So the first thing the plaintiffs have to do is they have to plead the confidential witness had a job that would give him or more firsthand knowledge of the facts the witness

is allegedly disclosing. Firsthand knowledge. It's not enough the plaintiff was around to hear a rumor or was in a room to hear a speech. They have to have firsthand knowledge of important facts. Okay, in Chubb, the key witness was described as a Customer Services team leader. We should go to the next page. Go back. Sorry about that. Next one. There we go.

In Chubb, the guy described as a Customer Services team leader who had quote unquote worked for Chubb for six years and was thus very familiar with how it operated. Now, this witness allegedly disclosed facts about Chubb's nationwide reserve setting policies. The Court said that: "It cannot be disputed that this description is wholly insufficient." In other words, the fact that somebody was a customer services team leader with six years of experience at Chubb didn't give that person a right to make disclosures about whether or not the company had a particular national reserve setting policy.

Here, the plaintiffs describe, and there's a fair number of confidential witnesses, so I'm summarizing a bit here, but the plaintiff described the witnesses with even less detail. You've got an employee who quote unquote worked in product development, and one who quote unquote worked in project management cited for statements regarding financial reporting software, financial for the cost of software, and the frequency of their financial reporting. Two things completely divorced of each other. There's nothing in the alleged

description of witnesses that they would have any firsthand knowledge of what they're allegedly disclosing.

The plaintiffs also cite statements of VMU's use of financial standards and reporting and analysts, but they don't describe what the person analyzed. A customer care employee, another project manager, and someone who worked in quote unquote various positions for VMU. None of this is nearly enough information to indicate they possess personal knowledge of what was allegedly disclosed.

Secondly, the facts that the confidential witnesses allege are not sufficient, even if you credited them, even if you assume they could know firsthand what they were saying. Those facts taken by themselves are not sufficient to support the plaintiffs' allegations.

So plaintiffs' alleged VMU had forecasting software and that quote unquote forecasting and financial reporting were done on a weekly basis. But that's less than what was alleged in Chubb. In Chubb, it was alleged that management had meetings every two weeks to review the specific types of financial results at issue in the complaint. And the Third Circuit found that that was insufficient. In other words, a specific allegation that management reviewed financial results every two weeks wasn't enough, it wasn't detailed enough. That's much more than was alleged here.

The Chubb court says that to be meaningful, plaintiffs

would have to allege the specific meetings at which the data was discussed, what the data was, who was present, who prepared the reports, when they were prepared, how official the numbers were. And that's important because, yes, the quarter was over, but, you know, we're just recently over. The plaintiffs' allegations are just woefully short of this, and I'm not going to go through line by line on these. We talked about them in our papers, and I'll rest on those. But I just want to stress again I think the confidential witness's statements are simply not sufficient to be meaningful in this context.

Okay. This takes us to the very last point that I'm going to address today, and that is, in the opposition brief, really for the first time, I didn't read this from the complaint originally. Plaintiffs may argue its there, but I didn't read this from the complaint. Originally in their opposition brief for the first time the plaintiffs argue that the prospectus is misleading because it contained positive statements, which I believe they would concede are true on their face. In other words, the specific facts are true. But a positive statement about VMU's past performance or plans that were rendered misleading because of the failure to disclose the three buckets of information we've just been discussing. Plaintiffs also lumped in a bunch of other general stuff, which I can talk a little bit about but I'm not going to get into in detail because I think the first three points don't get them

past the line of being plausible, and the rest of the stuff is not going to.

Here's what the prospectus actually says. The prospectus says. VMU's total operating revenue and net income increased year over year and from the first six months of 2006 to the first six months of 2007. Those are objective facts. I don't think anybody challenges they're true.

Next is VMU has continued to grow our customer base rapidly. And that's shown by the substantial addition numbers I showed you earlier that the gross subscribers are going up. VMU is one of the lowest cost operators in the wireless industry with a highly variable cost structure allowing the company to reach profitability faster. I don't think any of those things reach profitability faster, one they're challenging. Generally I don't think those specific statements are generally challenged as untrue. Prospectus also says, and the plaintiffs claim this is misleading, that VMU aims to maintain and strengthen a vibrate brand image. That VMU will continue to enhance its brand through a variety of steps. And that VMU is the number one brand for prepaid wireless services in the United States in awareness among people 14 to 34. Okay.

What the law says is that none of these complained of disclosures is misleading, actionable or otherwise requires additional disclosures. Because why? One, they're true. Accurate reports of past successes do not give rise to a duty

to inform the market whenever present circumstances suggest that future may bring a turn for the worse. I'm quoting Shaw. There's a legend of cases out there that say accurate reports of past success do not require you to disclose early outside of the normal reporting structure the fact that things aren't going so well now. And the second is simply that cautionary language is out there that rendering the alleged omissions immaterial. This, your Honor, by the way, is the piece of the plaintiffs' argument that I believe 9B applies to.

Now, what I've just said, and let's actually do this first and let me get to the 9B point. I'm not going to read all these, there's about three pages that look like this. I've already sort of commended to the Court the risk factors and the management discussion analysis which is where all this comes from. But if you look at this, look at what the prospectus also says. It says: We have a limited operating and financial history, can't be certain our business model will be profitable or competitive. We experienced and may continue to experience continued fluctuations in revenues and cash flows. If our growth is unsustainable, we won't be able to generate the earnings to fund operations. Talks about competition in the wireless industry, which I already talked about to some extent. It's a very difficult market place, and they compete with people with a lot more money and a lot more scale then they have.

Competitive pressure to reduce prices. This goes along hand in hand with competing with people who have a lot more scale and a lot more money than you do. They can reduce prices, continue to lose money for a long time before they run out of it. It's difficult for a small company. Can't be certain if the Sprint network they rely on is necessarily going to allow them to do the same new service offerings that others might do.

Customer turnover. Talks about the fact that network coverage, hand set quality, a variety of factors can cause customers to turn over. And it says specifically: We don't require long-term service contracts. It's a part of their business model. They don't try to get young people who don't have long-time commitments. Their customers can terminate service. Their churn would be expected to be a little higher, and they talk about what that means. I already talked about the declining substantial growth.

Again, there's a lot more disclosure than this in here, and I really think that this is an excellent almost model prospectus, and I would ask the Court to take a look at it, as I think that's what the cases really require here, but I believe that's really the key point.

Let me just step back because I believe the conclusion here is that in light of all that, those disclosures are sufficient under Trump and the other cases that say: Look,

effective warnings are enough to render alleged omissions Immaterial as a matter of law. And I think here if you look at them, and you tie them back together, you're going to say that's what happened here.

Let me talk briefly about the 9B point before I quit, which I will do shortly, and that is, that here's the reason I think 9B applies here. Again, I don't think they satisfied Rule 8, so I don't think I have to get here. But if the Court thinks maybe they have gotten close to nudging it across the plausible line to what a reasonable person might think is meaningful somehow, again, I don't think you should, but if you did, I think you would really need to look at this and say: Really, 9B, for this particular set of claims, this sort of -- those statements in the claims in the prospectus that are positive are rendered misleading because of sort of this -- I'll call them the three specific admissions in the haze of other things. You have to say 9B is what really applies, particularly because of the haze of the other things here. What they're saying in that haze is that, well, the company, according to our confidential witnesses, who you shouldn't credit, but if you did, according to them, the company was decreasing its advertising spending, it was laying people off. It was extending its payables to try to conserve cash, doing a variety of things that, you know, a healthy company is not suppose to do.

First off, these are management decisions, and the law is really clear, management decisions aren't disclosable. They're just not. The effect of them can be when you get there. But you can't make a company disclose every time they decide, well, you know, we're going to lay some people off, we're going to hire these people, unless you actually hit a firing that's of a required reporting person. Those sorts of things are not disclosable under this law, and separately and of themselves they just don't get there. But what they're really saying is the company made affirmative statements, all those affirmative positive statements I put up there before, while at the same time they were taking affirmative actions, they were firing people, they were delaying payables, they were decreasing advertising. Those are things you don't do by negligence or accident, you do on purpose. They're saying: You made purposeful statements at the same time you were taking purposeful actions that are directly contradictory to those statements. That's fraud. And even though the Chubb case has a nice quote, and there are other cases that say the same, a one sentence disavowment of fraud in the complaint does not divorce the claims from the fraudulent underpinnings you don't like. We're not pleading fraud. You have to look at what the complaint actually says. And in Chubb, for example, the Court applied 9B to a Section 11 claim because the plaintiffs allege the company -- here's a quote, concealed key factors from its

disclosures, exactly what the plaintiffs are claiming here. And consequently that the earnings for cost, and this is what the plaintiffs' claim were quote unquote false when made. That's exactly what the plaintiffs alleges here. Alleging concealment, which is active. Alleging concealment is alleging fraud. And even though Section 11 doesn't require you to allege fraud, when you do, you have to satisfy 9B. And for all the reasons I just described, you couldn't even possibly argue these guys are getting close to meeting the 9B standard.

And so, your Honor, for all of those reasons, we respectfully submit the complaint should be dismissed in its entirety, and should be dismissed within its entirety because if you look at the disclosures and prospectus, this is a fixable complaint.

THE COURT: Very well. Thank you, Mr. Gamble.

All right, anyone else arguing on different side? All right, Miss Sultzstein.

MS. SULTZSTEIN: Good morning, your Honor.

THE COURT: Good morning.

MS. SULTZSTEIN: Susan Sultzstein on behalf of the underwriters, and good morning, your Honor.

Your Honor, I'll be quick, and I certainly don't want to repeat what's already been said on points we agree within our brief and have been made already. Just a few things I want to add to the argument today.

Your Honor, the opening line of plaintiffs' brief with respect to its legal standards starts with a very stark declaration. They say that it's axiomatic that motions to dismiss are viewed with disfavor and are rarely granted.

Your Honor, I don't believe that's the case. And when you go back and you look at the cases that they cite in support of that declaration, they're out of circuit cases that are housing discrimination cases, disability discrimination cases. None of those cases are securities cases, and none of them -- and all of the cases they cite predate the Supreme Court's decision in Twombly.

Far from anomalous, the list of decisions that grant motions to dismiss in the context of a Section 11 case is long. And the long list includes not just cases decided under Rule 9B, but cases also decided under Rule 8. And I've compiled, I've already given it to counsel here, but I have compiled an illustrative list of some of those cases, if I can hand it up to the Court.

What's interesting about the list as well is besides its 9B and Rule 8 cases, is there are cases that really speak to the issue that the Court is confronted with here, which is the claim that a company has gone out, it's introduced itself to the public with an IPO. That sometime after the IPO was announced and went effective, the stock price fell and the shareholders suffered a loss and they say and there are cases

in that pile that say: And what do you do when? And the plaintiffs argue in those cases that because you didn't prematurely disclose your interim results, that you're somehow engaged in violations of the Securities Act. And those cases say, as I believe we've gone over through the list, if you look at the In re Arbinet and Panther Partners and N2K Securities litigation, all of those cases speak to that very issue, and come to the conclusion, after reading over the prospectus, that the extreme departure test was not met.

I do want to talk a little bit about context, your Honor. Last year alone, according to a study that was done by the National Economic Research Associates, and it's a group that -- it's a group economic, and they put out studies on -- they follow trends in filings. That they were 255 securities -- shareholder class actions that were filed in 2008. And filing those cases, the security class action cases have become something of a cottage industry. Every time a company announces bad news and the stock price drops, there is typically a complaint filed along with it.

The Supreme Court in the Twombly decision goes as far as to recognize the practical significance of Rule 8 in these kind of circumstances. And it was talking in the opinion, and this is at 1966, not just about the -- not just in the anti-trust context, which is what Twombly was dealing with, but it speaks specifically to cases that arise under the Securities

Law and the court said in those cases that where -- that when you're dealing with Rule 8's pleading requirement, there's a risk that a plaintiff might be permitted to proceed with a largely groundless claim, and be allowed to take up the time of a number of other people with the right to do so representing an interim increment of the settlement value. And so according to the Supreme Court, when the allegations in the complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should be exposed to the point of minimum expenditure of time and money by the parties and the Court.

I think the overarching theme, your Honor, is context matters in pleading. And recognizing the potential for abuse, and the proliferation really of strike suits like this one, claims arising under the Securities Law is an area of law where courts aren't particularly vigilant in looking at the pleadings.

Now, plaintiffs also seem to be arguing that the Court isn't entitled to look at the complaint and compare it against the registration statement, which really forms the basis of what they're suing on. I mean, that's what they're pointing to and they make that argument on no fewer then eleven occasions. They say plaintiffs claims that the Court must defer to what they call fact intensive questions of materiality. But I believe here again the plaintiffs are misconstruing the burden of their pleadings and the Court's role.

A similar argument of fact was made in the Castlerock Management case. And there the plaintiffs, like here, tried to plead around the pleading requirements of 9B and said: No, no, no, we're just making a negligent misrepresentation claim. The Court in that case said: Plaintiffs -- and I think it's in words equally applicable here -- plaintiffs appear to be confusing Federal Rule of Civil Procedures 9B particularity requirements implicated in fraud actions with the requirements of Section 11 itself, which by the plain statutory language require that the registration statement contain a material misstatement or omission, when such part became effective. They say plaintiffs' allegations, while presented under a theory of negligent misrepresentation, still requires the presence of an affirmative statement that is made misleading by the material omission. So that's -- and then the Court goes on and looks at the registration statement against the standards.

Scrutinizing the offering documents against the claims asserted in the complaint to determine if plaintiffs stated a claim and had met the requirements of Twombly, not a lesser standard, Twombly is the standard here, is exactly what is required. And, you know, that's the best way and I think the only way to determine whether or not a complaint has alleged specific, non-speculative, contemporaneous facts with sufficient detail to make its theory not just conceivable, not just possible, but according to Twombly, it has to be

plausible. And when you make that comparison here, and you look at the registration statement against the complaint, there's nothing that they've pointed to, nothing in the registration statement that was rendered false and misleading by any later statement made by the defendants.

I just want to spend -- say a few words about the policy considerations here as well. I'm representing the underwriters, your Honor, and the underwriters are part of the capital markets, and the capital markets need certainty. Part of the entire scheme of the securities regulation process is that you have quarterly filings. Company files first quarter, second quarter, third quarter, they have their annual report. And the rule that's been developed in the cases like Shaw and Turkcell and have been followed by other courts is that to step away from that filing process requires an extreme departure, right, and the reason is for entities like underwriters, like accountants, it puts -- it would put -- if it was required in any case that you had to disclose early what your results are, where they may not have been collected, right, the results may not have been known, where that doesn't have the benefit of the reliability of people looking over them and seeing what the numbers actually mean, you're putting the third parties in a very difficult position. And it runs contrary to the SEC's disclosure requirements which require's quarters, not daily, not weekly, not biweekly reports. And really the essence of

the rule is to give companies time to get it right. Otherwise, you'll have the case where disclosures are made and the reliability of which can't really be tested.

I want to make just one final remark, your Honor, in terms of pleading fraud by hindsight, or pleading claims by hindsight in this case. That's extended not just to the 9B standard. You can't just say, as plaintiffs have done here, looking, we're going to look to the November statement that the company made, we're looking to the March statement that the company made, we're going to look to the February statement that the company made, and from that say: Aha, something that you said earlier must have been known. That's not a permitted pleading standard. That doesn't meet the pleading standard. The "must have knowns."

THE COURT: So your position then, Miss Sultzstein is they have to put that in their complaint what they knew, when they knew it, how they knew it, et cetera, as opposed to, if you look at these documents that exist after the filing of the IPO?

MS. SULTZSTEIN: That's exactly what I'm saying. If you look at the case they cite, which is In re Adams Golf, that looking backwards one perceives a trend, does not necessarily mean that conditions were such that at earlier times the situation was sufficiently obvious or noteworthy. And if you look at Arbinet-thexchange at page 8, Panther Partners at page

673, your Honor, Castlerock Management, I think that's at page 323, note 5 in the Castlerock case the Court said, and this is also a Rule 8 case, that liability cannot be imposed on the basis solely of subsequent events. Is no less the case when a plaintiff proceeds under a negligence theory.

And with that, your Honor, I will take my seat.

THE COURT: Very well, Mr. Sultzstein.

Anyone else.

MR. MICHELETTO: It's now afternoon, your Honor. Robert Micheletto of Jones Day on behalf of defendant Sprint Nextel Corp. and Douglas Lynn.

I am last here today, but hopefully not least. I am going to proceed briefly on the Section 15 claims that have been asserted against my client Sprint Nextel Corp. as well as against Mr. Gamble's client Corvina Holdings Limited. Neither of those two entities have been sued under Section 11 for a primary violation. They have been sued only under Section 15. They are the only Section 15 defendants. And what the plaintiffs are trying to do through the mechanism of Section 15 is essentially to hold these two entities, Sprint and Corvina, secondarily liable for the alleged primary violations of Section 11 by the other defendants.

Let's take a look at Section 15 standards. There's no dispute about this aspect that to state a claim under Section 15, plaintiffs must plead at least two things. One, a primary

violation of the Federal Securities Law by a controlled person; and two, control of the primary violator by the defendant.

In Tellium, Judge Wolfson found there was an additional or third element that is necessary to plead or state a claim for violation of Section 11, and that is culpable participation in the primary violation of the defendant. Plaintiffs have cited several cases admittedly that disagree with this standard. There are other courts within the Third Circuit, Ravisend, that agree with Judge Wolfson and found there is in fact a third element of culpable participation. Mr. Gamble, I thought, very persuasively demonstrated this morning in oral argument why plaintiffs' primary claims for violation of Section 11 should fail. If in fact those claims do fail, then it is the law there can be no secondary liability under Section 15. So if the Section 11 claims are dismissed, so too must the Section 15 claims be dismissed.

I believe the real point of contention, your Honor, with regards to -- in addition to whether or not there's been effective Section 11 claims stated with regards to the Section 15 claim is with regards to the second requirement, and that is, control over the primarily violator by the alleged secondary violator, namely Sprint and Corvina. And the law in the Third Circuit and others with regards to what needs to be pleaded to establish control is fairly well settled, I think.

Let's just start with what the courts have found

pretty much across the board for what control is not. Control is not the mere ability to persuade or to affect the primary violator's actions. There has to be more. Control is not the mere fact of stock ownership, nor is the mere fact that a person was a director sufficient in and of itself to establish control.

Now, the SEC has defined control as "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities by contract or otherwise."

And the courts are basically in accord with this definition, and many of them have in fact expressly adopted it, and the courts pretty uniformly have found that actual control, not hypothetical or speculative control, but actual control over the primary violator is necessary. And the courts have said that that means that the secondary actor has a practical ability to direct the actions of the primary violator. And it's also pretty clear that all these cases, if your Honor looks at them, and many of them are cited in our brief, that conclusory allegations without adequate factual support are simply insufficient to establish control. It's not enough to merely repeat, as I think plaintiffs have done in the very few allegations in their complaint that actually relate to Corvina and Sprint, to merely repeat the legal standard for Section 15

liability. You've got to plead facts. And those facts need to establish actual control.

I'm not going to spend a lot of time going through the cases, but I think it's important to look at least a few of them because the courts have set a fairly high standard for pleading control. And one of the primary cases upon which we rely in the briefs is the Flagg case out of Southern District of New York. And in that case the court dismissed a Section 15 claim against Verizon for failure to allege facts showing that Verizon had actual control over Flagg, who was the alleged primary violator, even though plaintiff alleged these following facts: One, Verizon's predecessor company founded Flagg; two, Verizon owned almost 30 percent of Flagg's voting stock and was the company's largest shareholder; three, Verizon designated three of the nine members of Flagg's Board of Directors; four, an analyst concluded that "the bond between the two companies is extremely strong where key strategic decisions are approved by both Verizon and Flagg"; and five, Flagg was "instructed," and that's in quotes, and strong armed by Verizon and its designees on the Flagg Board to act "for the benefit of Verizon and to Flagg's detriment." Notwithstanding all of these allegations, which are very factual in nature, the Court found that the plaintiff had not adequately pleaded actual control by the secondary actor over the alleged primary violator and dismissed the Section 15 claims.

Sloan, which is another Southern District of New York case decided in 1996, which is a case that plaintiffs rely on fairly heavily, similarly dismissed a Section 15 claim for failure to plead control under similar facts. In that case the plaintiff alleged that the defendant was a founder, creditor, shareholder and underwriter of the alleged primary violator and had a representative on the primary violator's Board of Directors and those allegations, according to the Court in Sloan, were insufficient to establish actual control.

Let's look at what plaintiffs have alleged with regards to Sprint and Corvina to try to establish actual control. It's important to note of the 121 paragraphs in the complaint, by my count only five, five, are specifically directed towards Corvina and Sprint. And if your Honor looks at those allegations, and they can be found in paragraphs 19 through 20 and 119 through 121, your Honor will see, I think, that even those few allegations in the complaint that are directed towards Sprint and Corvina are conclusory in nature. Most of what the plaintiffs do is simply repeat the legal standard for Section 15 liability without any factual support.

With regards to Sprint, in the way of facts, plaintiffs allege two things. One, that Sprint owned less than a majority of the interest in Virgin Mobile U.S.A., specifically a 46, roughly a 46 percent interest in the company; and two, Sprint -- one of the eight Virgin Mobile

directors was a Sprint designee. Interesting, plaintiffs concede that Sprint designee, who is a defendant in this case, Douglas Lynn, was on the board only as of August of 2007, a mere -- roughly two months before the IPO in question in this case.

As to Corvina, plaintiff alleges, as it did with regards to Sprint, that Corvina owns less than a majority interest in Virgin Mobile of approximately 46 percent. And Corvina is not alleged to have designated any of the Virgin Mobile directors. What is alleged is that three of the eight Virgin Mobile directors were designated by the Virgin Group, which is alleged to own Corvina, but that does not support any inference that Corvina, itself, had any control over the VMU board or VMU, itself. Similarly, with regards to the fact that Sprint had only one of the eight directors, there was no way from that fact alone that the Court can infer that that one director, through that one director, Sprint could have possibly controlled the VMU board. And there are again no other facts, if your Honor looks at paragraphs 19 through 20 and 119 through 21 alleged with regards to supposed control over VMU by Sprint and Corvina.

In their opposition papers, plaintiffs, although this is not in the complaint, point to certain representations in the registration statement that Sprint and Corvina collectively had the ability to control VMU. While that maybe true, your

Honor, those allegations do nothing to show that in their individual capacities, which is the appropriate focus, do nothing to show that either Sprint or Corvina had actual control over VMU and its Board of Directors.

And lastly, your Honor, the -- if your Honor agrees with Judge Wolfson that culpable participation in the primary violation should be an element of a Section 15 claims, and we believe it should be, your Honor, and that Judge Wolfson's reasoning in that regard is sound, there is no dispute that plaintiffs have not pleaded any facts whatsoever demonstrating that either Sprint or Corvina culpably participated in the primary violation here; namely, the Section 11 violation.

For all these reasons, your Honor, as well as for the reasons set forth in the briefs, we request that the Section 15 claims against Sprint and Corvina be dismissed with prejudice. Thank you.

THE COURT: Thank you, Mr. Micheletto.

All right, plaintiff's counsel.

MS. MILLER: Good afternoon, your Honor.

THE COURT: Good afternoon.

MS. MILLER: Counsel.

THE COURT: Counsel, you're Miss Miller?

MS. MILLER: Yes. I don't have a power point presentation today, but I do have my sticky tabs, so hopefully those will help.

THE COURT: You can't pass those up.

MS. MILLER: No, if I can only read them.

I'd like to start off by, lowering the microphone, with a policy point, your Honor. The underwriters counsel spoke to the importance of policy here, and I really couldn't agree more. In light of what's going on in the financial markets today, the recent sensational news about Bernie Madoff and companies like Stanford, the regulatory system in this country has failed. It is more important now then ever that the government, that the SEC has the assistance of private civil actions, has the assistance of attorneys on behalf of sophisticated individual investors such as the lead plaintiffs here, to go in and to make claims under the Securities Laws and to have those cases looked at very carefully. It can't all be left up to the SEC, especially now.

With respect to the standards applicable to this case, I would like to speak to the Twombly standard, which has been referred to by the defendants as a lowered standard, just to say clearly in the Phillips case, the Third Circuit in 2008 has just noted that the Supreme Court in Twombly expressly reaffirmed that Rule 8 requires only a short and plain statement of the claims and their grounds. Put another way, in light of Twombly, Rule 882 requires a showing, rather than a blanket assertion of an entitlement to relief. Thus, under our reading, the notice pleading standard of Rule 882 remains

intact and courts may generally state and apply the Rule 12(b)(6) standard attentive to context and showing that the pleader is entitled to relief. It remains an acceptable standard, your Honor, and Twombly specifically says this. To accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether under any reasonable reading the plaintiff may be entitled to relief.

Now, your Honor, with respect to standards, although none of the defendants raised it in their opening motions, none of the defendants raised the 9B issue. None of them.

On reply, there was a small note in the main defendant's brief suggesting that Rule 9B should apply to this case. Rule 9B does not apply to this case, your Honor. And there is no colorable argument that it could or should. The only case cited to support the idea that 9B should be applied here was a citation to the Chubb case.

Your Honor, the Chubb case was a 10B case. It also included Section 11 claims. The Court in Chubb said: "The core theory of fraud permeates the entire complaint. The linchpin is knowing and intentional conduct for the purposes of effectuating a merger and for good measure the plaintiffs incorporated by reference all of the 10B allegations, including scienter, into the complaint. Clearly not the case here. If there were a case that can be pleaded within the construct of

Section 11 for negligence, if the statute in fact exists and provides a remedy, this is that case, your Honor. We have pleaded a straight claim under Section 11 for negligence, for strict liability of the company. There's no doubt there are no allegations of fraud here, and it is very plain that Rule 8 applies, Rule 9B does not. Excuse me. And just to follow up on what follows from the fact that Rule 9B does not apply, I'm going to take my argument slightly out of order, but just since we are talking about Chubb, and since that is the case that addresses sources, I'd like to address the source issue.

Under Rule 8 of course no sources are required to be identified. In fact, the defendants repeatedly characterize this case as one of fraud by hindsight, which is a mystery to me since we have no fraud claims here. There are no allegations, whatsoever. And of course your Honor has already raised that question.

Nevertheless, even the Rule 8 applies. We have no less than eight confidential witnesses, all of whom are described in terms of their position, the time they work at the company, including a project manager, an accounts receivable employee, an employee who was employed by the ICT group, which was a Virgin Mobile customer service center representative, a person who worked in revenue forecasting. All of these eight confidential witnesses, and frankly many complaints are upheld under 9B when you have one or two witnesses, here we have

eight, certainly support our claim under Section 11 and make clear that this is not a case where the stock dropped and then the plaintiffs pleaded a negligence case. We did an investigation. We found contemporaneous facts from credible sources which we have pleaded which demonstrate the facts available at the time the statements in the registration statement were being made.

And along those lines, your Honor, then the Castlerock -- the Castlerock case is not inconsistent with this. All the Castlerock case stands for is the proposition that you must allege a material misstatement. Well, of course, in order to state a claim under Section 11, it's required that the plaintiff plead a material misstatement or omission in the registration statement, which we have done here.

And with respect to the fact that in their briefs and in argument today the defendants have relied -- the defendants have relied on many 9B cases and have said: Well, it's okay to look at in the context of this or that. As noted by the Third Circuit in In re Adams Golf in 2004, "the requirements under Section 11 stand in stark contrast to those of the Securities Exchange Act of 1934 which include a showing of reasonable reliance and scienter."

Your Honor, I'd like to specifically go to this issue of knowing and whether -- there appears to be some confusion in order to state a claim under Section 11 there is no scienter

component. There is no knowledge component. Defendants claim that part of this case hinges on Section 303, which requires the disclosure of known trends and uncertainties. That does not trigger a scienter requirement. In fact, this case can stand or fall without regard to Section 303 at all and I will speak to that. But just to be clear, from the context of actually stating a claim under Section 11, knowledge is not required. What is required is a showing, some showing sufficient to meet Rule 8 notice standards that at the time the statements were made, that the conditions at the coexisting -- that conditions and what was happening at the company showed that, without proper context from -- information that was omitted, that the statements made were materially misleading. And that's why we have all of these statements from our confidential sources showing contemporaneous information that was happening at the company, regardless of who knows it.

In addition, with respect to the 303 issue, we have alleged in paragraph 33 of our complaint that the defendants had daily forecasting, regular meetings that at all times they had a current financial snapshot of the state of the company at any given time. Of crucial importance here, the third quarter ended weeks, your Honor, almost two weeks before the October 10th initial public offering. Those results were in hand. The quarter was completed.

I'd like to talk about the Shaw standard in which the

Court held that where there was an extreme departure, it was required that results for a quarter in progress that was 11 days from completion prior to the IPO, that because of the extreme departure, that it was mandated that the facts that were -- the trend that was in the hands of the company be disclosed and the statements were held to be actionable misrepresentations and omissions because that trend was not disclosed. Of course what we have here, your Honor, is much more than a trend and much stronger than Shaw, because we have results in hand.

THE COURT: What about the argument that Mr. Gamble makes that throughout the prospectus, there's talk about obviously the net subscribers decreasing and the number of subscribers decreasing, that's something that would have alerted a potential purchaser of the stock of this trend, so to speak?

MS. MILLER: Well, with respect to the idea of a trend, and in fact whether or not it's a trend, defendant Schulman in fact described as a trend what was going on with the company. So he gave that label to what was going on. However, it's very clear that in accordance with what the complaint alleges, that the registration statement discloses and does not disclose the statements that we expect expenses or conditions or growth to continue to go down. What we have alleged is that the defendants already had in hand a dramatic

departure from prior results. Expenses were going up even though the defendants tied expenses to substantial growth and that growth had gone down already. And of course this is not an interim -- the quarter has been completed already and so this is not an issue that the results are not in hand.

In the Shaw case, though, there is terrific language, and even though our facts are much stronger here, and arguably we don't need 303, the Court in Shaw said: To focus here on a duty to disclose in the abstract, however, would be to miss the obvious in favor of the obscure. This action arises out of an allegedly defective registration statement and prospectus filed in connection with a public stock offering. The obligations that attend the preparation of those filings embody nothing if not an affirmative duty to disclose a broad range of material information. The Court goes on to conclude that it cannot say that the defendants were not required to disclose material information concerning its performance in the quarter in progress at the time of the public offering, nor could they conclude as a matter of law that the company was not in possession of such material non-public information at the time of the offering. Of course on that latter point, again paragraph 33 plainly alleges that they had that information in their possession. So, your Honor, I would argue that the -- I would argue that the Shaw standard, the extreme departure is not triggered here. We don't need it here, and that in fact

the defendants were required to disclose this information under the tenants of Section 11 itself. And the basic regulation that talks general disclosures in 17 CFR Section 230.408, which provides: In addition to the information expressly required to be included in a statement or report, there shall be added such further material information, if any, as maybe necessary to make the required statements in light of circumstances under which they are made not misleading.

Your Honor, the defendants don't point to a single case that a factual scenario directly analogous to this one on the crucial point that the quarter had ended. There are cases that hold that interim results for a quarter in progress need to be disclosed because they constitute an extreme departure. There are cases that say the extreme departure standard is not met. There are no cases with these facts that support the idea that when the quarter has been completed, and when the results when ultimately revealed cause a material drop of 30 percent in the price of the stock, when it's revealed that customer additions have dropped by 50 percent, when it's revealed --

THE COURT: But they've been dropping, right?

MS. MILLER: Well, they've been dropping by 30 percent, but they disclosed that they've been dropping by 30 percent. But they already had information in hand that the drop was 50 percent. So there's a pretty significant difference between 30 and 50, and it's not just on the customer

adds, but also the losses.

And with respect to the specific issue of the widening losses, Mr. Gamble said the loss declined, it didn't widen. However, the defendants in their main brief cite to a November 16, 2007 analyst report. It's actually in -- it's attached to one of their declarations as Exhibit 9. The headline is: Despite upgrade, Virgin Mobile falls after reporting wider third quarter loss. And to quote just one line. "Virgin Mobile said late Thursday that its third quarter loss widened to 7.3 million compared to the loss of 5.1 million in the year ago quarter."

I point this out not because it matters one way or another whether exactly the loss was characterized as widening or not, but the defendants are attempting to say that there are no factual issues here, and the idea that Mr. Gamble can say that the loss declined, it didn't widen, and yet Virgin Mobile's own brief says and quotes an analyst which goes back to quote the company to say that there was a third quarter loss that widened.

And also with respect to facts that the defendants attempt to put in to create some issue where none exists with regard to whether or not disclosure was required of the results that caused ultimately a material drop of 30 percent. The company, in the main brief -- in their main opening brief, they actually goes to great lengths citing no less than five or six

articles saying that there was already an industry trend at the time of the IPO. That in the industry, comparable companies, there was a fall. In fact, those five or six articles specifically cited and attached to their motion papers, again, not that this is a central issue, but they directly, the language in each of those articles directly contradicts what they claim the articles support. Each of those articles show that there was no general industry down turn until the first quarter of '08. They claim that these articles support a down turn in the third quarter of '07, and that's demonstratively false, and supports the idea that our claims are adequately pleaded, and they're looking for things to make an issue out of because they don't have a real issue under Section 11.

I'd like to speak briefly about materiality, because after all, materiality is really the central issue that we should be focusing on here, were they're materially false -- materially untrue and misleading statements.

In the Merck case, the Third Circuit in 2005 said that in the context of an efficient market, Section 11 and 10B share the materiality element and share the stock price test for materiality. If a company's stock trades on an efficient market, we measure materiality under the Burlington standard. Thus, materiality of disclosed information maybe measured post hoc by looking at the movement in the period immediately following disclosure of the price of the firm's stock.

Now, your Honor, there are two materiality standards. There's the TSC, Supreme Court industry standard, which is addressed in the briefs. Only if the alleged misrepresentation or omission is so obviously unimportant to an investor that reasonable minds cannot differ is it appropriate to rule the allegations are unactionable as a matter of law. That's also cited in the Adams Third Circuit case, which is very recent. That's at page 275.

However, here, in addition one can look to the Merck materiality standard to show that the disclosures of the fact that the statements in the registration statement and the omitted information was in fact material, the stock drop is an indicia. That applies here. Virgin Mobile is alleged to have traded on the New York Stock Exchange. There can be no serious dispute that that is an efficient market and that the Burlington -- that the Merck standard is applicable here.

Now, the defendants make an interesting argument with respect to the four partial disclosures that occur through which we allege the true fact is that the registration statement contained materially untrue and misleading facts and omissions were revealed. They seem to think that we are alleging that those four statements are additional actionable statements. Of course only statements and omissions in the registration statement are actionable under Section 11. The reason that we have included the details regarding the

disclosures, the four partial disclosures culminating in the March 12 final disclosure is to show the information that was revealed and the impact on the stock price. The impact was tremendous. Volume increased. In some cases volume doubled or tripled. The stock dropped when the third quarter results were revealed.

THE COURT: Give me the dates again.

MS. MILLER: Thirty percent -- sorry.

THE COURT: The dates? The IPO occurs in October?

MS. MILLER: Yes.

THE COURT: And just break down for me when the third quarter ends, two weeks obviously before the IPO occurs.

MS. MILLER: The third quarter ends September 30, 2007. Those results are in hand then. The IPO occurs October 10, 2007. The results for the third quarter are not released until November 15 -- here it is. There's a section, your Honor, in the complaint starting at paragraph 69, discussing the truth emerges causes plaintiffs' economic loss. It is in paragraph 71 through 76 that there's a discussion of the first, the November 15, 2007 revelation of the poor third quarter results where defendants disclose that the company had suffered a widening loss for the third quarter. The period ended September 30, 2007, as a result of rising expenses. The company specifically reported a net loss for the third quarter of 7.3 million compared to a net loss of 5.1 million for the

third quarter, 2006, and the company reported that it added only 45,830 customers in that third quarter, which was approximately half the amount in the same quarter the previous year. It was also reported that churn, which is the customers who drop off monthly, churn for the nine months ending September 30, was 4.9 percent up from 4.6 percent. We then allege that the stock fell almost 30 percent.

The next of the four partial disclosures occurred on January 16, 2007, where the resignation of the company's chief marketing officer was announced revealing financial --

THE COURT: Two thousand eight, right?

MS. MILLER: You are right. And my complaint has a wrong date at the end -- at a heading just above paragraph 77 there's a typo. January 16, 2008, the resignation of the company's chief marketing officer revealed the financial and marketing problems.

Now, I'd just like to, before I get to the final disclosures, show why this is important. Because the information regarding the chief marketing officer's resignation, which led to a 20 percent decline, relates specifically to statements in the registration statement that Virgin Mobile had touted that it, for example, I'm just going to, rather than summarizing it, I'm just going to point you specifically to the complaint in paragraph 40. The company states in the registration statement: We aim to maintain and

strengthen a vibrant brand image that resonates with our customers and distinguishes us from other wireless service providers. And then goes on to say: We will continue to enhance our brand through targeted marketing advertising, product packaging, point of sale materials and innovative services. But of course the complaint alleges that at this time the company was facing financial difficulty, cutting marketing personnel and advertising costs, and significantly weakening its brand strength.

The next disclosure occurred on February 4, 2008, when the company reported poor fourth quarter results on inability to complete, and also surprisingly that it missed its own projections that it issued just months prior in its Q 307 earning statement.

I'd like to point the Court to the In re Children's Place decision which is a decision in which the Court held that statements relating to seasonal fluctuations and the possibility that later quarters may have problems, those types of statements were deemed actionable in the Children's Place case and have -- and those statements have language very similar to the seasonal fluctuation and the possibilities that the dependence of the company on the fourth quarter, very similar to Children's Place, where those types of statements were upheld. And, in fact, Children's Place was another situation where there were -- there was a quarter in progress

at the time.

And then finally on March 12, the final disclosure occurred. The complaint alleges that the full truth was finally revealed in the company's final fourth quarter results and first quarter guidance. And the complaint notes that while the defendants blamed poor performance on the fact that while competitors were aggressively lowering prices in the fourth quarter to impact gross adds, we chose not to pursue what historically have proven to be lower value, loan tenure customers. Importantly, the complaint goes on to say the IPO registration statement contained no risk factor to warn that defendants would be unable to compete with other providers, especially in the crucial fourth quarter.

Your Honor, a lot is made about the risk disclosures in this case. But if you look carefully at the actual disclosures, many of them say like: We may be impacted if we choose to do something where in fact at the time they'd already made a choice not to do it. We maybe impacted if we choose to bring down the price of our hand sets and increase hand sets subsidies. They weren't going to do that, your Honor. They couldn't afford to do that. They already possessed the financial information at the time, as our eight confidential witnesses show, to demonstrate that the company was losing money quickly, unable to increase its customers, had dramatic increasing expenses, despite the fact that it wasn't gaining

the number of net customer ads that it was anticipating. Nevertheless, these types of warnings don't fit here and don't help the defendants here because they don't fit.

I'd just like to briefly mention a couple of the other types of the statements which have not been touched on because really it does come down to an analysis of what do we allege the statements are, what do we allege the omissions are, are they material?

Here's one that wasn't touched on. Just above paragraph 49: Materially untrue and misleading statements regarding the company's internal controls. Just to take a look at one piece of this, at the end of allegation, paragraph 49, the company says: We are in the process of implementing procedures to remediate the material weaknesses that include an external assessment of our revenue flows and control points. The implementation of additional monitoring controls and the periodic reconciliations of the affected accounts and corrections to the interphase responsible for the errors. What it didn't say about internal controls, as we note in the following paragraphs 42 and 53, is the company used an out-sourced fulfillment house for inventory, and had a very difficult time in reconciling inventory numbers between its internal systems and the numbers in the fulfillment house's systems. And according to one of our confidential witnesses, confidential witness number 3, it was virtually impossible for

Virgin Mobile to accurately know its inventory numbers at any given time. And additionally, the chief information officer and two IT vice presidents had been fired.

Your Honor, this statement is incomplete, materially so. It omits to state that internal controls were not in the process of being remedied. The weaknesses were not in the process of being fixed and handled. They were outstanding material inventory control problems that go to the heart of internal controls.

Materially untrue statements about brand strength marketing in advertising, I think I touched on this already in paragraph 40. We will continue to enhance our brand through targeted marketing, advertising, product packaging, point of sales materials, and innovative services. But the company had already made drastic cuts in their marketing department. The company was facing severe financial difficulties, cutting advertising costs, marketing personnel, resulting in a significantly weakened brand strength.

We show in the complaint, we allege the statement, we say it was misleading, we say it omitted information. We provide the information that was omitted that we allege to be necessary to make that statement in accordance with Section 11 materially complete and proper. As we've alleged here, the statement is incomplete because it omits the material fact that the cuts in marketing personal, advertising cuts and cost in

financial difficulties, show that they were not enhancing their brand. They were not continuing to enhance their brand at all.

THE COURT: So you're saying there are a number of things that they failed to set forth in the registration statement essentially more than just there was a poor showing in this third quarter, which obviously is one of the main things?

MS. MILLER: Your Honor, the defendants are trying to make this case entirely about that issue in the third quarter, so don't even touch these other statements. There are several different category of statements. There are GAAP statements, there are internal control statements, there are marketing statements, and then there are statements that relate to the widening financial loss, which they say didn't exist, even though they cite in their own papers a statement by the company using the words: Widened financial loss in the third quarter.

They attempt to make this case dependent on 303 and trends. They say there was no trend, even though defendant Schulman called it a trend. And even though we don't even need to go to the Shaw standard of an extreme departure, which nevertheless we meet because of course when you go to a -- to net customer ads that are a 50 percent drop from the prior year, when you disclose in the prospectus that there's been a 30 percent drop, but now you're at a 50 percent drop, and plus there's also additional undisclosed losses, when they come out

under in the third quarter, under Merck, when the information was revealed, it was material because there was a drop of 30 percent. And when each of the four partial disclosures came out, there was a double digit drop, at minimum.

THE COURT: Talk to me a little bit about Mr. Micheletto's claims with respect to Sprint and Corvina and their actual control or, you know, constructive control.

MS. MILLER: Sure, your Honor.

Counsel for Sprint and Corvina says that there's no Section 15 control person claim adequately stated first because there's no underlying Section 11 claim. I think we've addressed that. But also because we have failed to allege control.

Now, every case cited by defendants on this Section 15 case, every case they cite is a section 20 case, which is a control person claim for 10B and falls under the 9B rule. We're under 8B. None of those apply and culpable participation is not a requirement in a Section 15 claim. Even when culpable participation is deemed to be a requirement under Section 10, most cases say it doesn't even need to be pleaded. But none of those cases apply to the Section 15 claim here. And we allege that the registration statement specifically contains, and this is set forth in page 40 of our opposition brief. I'm just going to point to a couple, but there are numerous statements that discuss control. Here's one. So long as Sprint Nextel

and the Virgin Mobile Group continue to own a significant amount of our equity, even if such amount represents less than 50 percent of our voting power, or the rights under the stockholder's agreement continue, they will continue to be able to influence significantly or effectively control our decisions.

And just one more. Sprint Nextel and the Virgin Group are principal stockholders, will hold the other two classes of our common stock and immediately following the consummation of this offering, will be able to exercise control over our management and affairs in all matters requiring stockholder approval.

Your Honor, there are many cases that say Section 15 should not be -- it's a factual issue and should not be decided at the motion to dismiss phase. Of course surely here where 9B doesn't apply, the only case support the defendants can point to is in the 9B context of Section 10B cases. It is certainly a factual issue when the registration statement specifically says that Sprint Nextel is a controlling -- will be able to exercise control. That Virgin Group will be able to exercise control and that Sprint Nextel will continue to be able to influence significantly or effectively control our decisions. Same with Virgin Group.

And counsel mentioned that there's something that says -- that it's collectively only. But these statements

don't say that you have to take the two groups together and that independently they don't exhibit control. The statements say that Sprint is a controlling person, and Virgin Group is a controlling person, and certainly plaintiffs should have the right to explore that in the course of discovery.

In light of defendant's concession that loss causation is not an issue here, which we plainly agree with, and for which there's controlling Third Circuit law, I believe if the Court does not have any further questions, that I'm done.

THE COURT: Very well. Thank you, Miss Miller.

MS. MILLER: Thank you.

THE COURT: Oh, Mr. Cecchi is trying to get your attention.

MR. CECCHI: I just thought of it. On the Sprint Nextel issue, this network operates on Sprint Nextel's network. Virgin Mobile, as it was pointed out, is not building towers, doesn't have the its own network. I think that goes to the factual issue. Sprint Nextel is the entity that gives Virgin Mobile the ability to make phone calls for people with a Virgin Mobile phone, to make phone calls. I think that raises another factual issues vis-a-vis control without Sprint Nextel, there is no Virgin Mobile. Thank you, Judge.

THE COURT: Very well. Thank you, Mr. Cecchi.

Mr. Gamble, you want to be heard further?

MR. GAMBLE: Just briefly, your Honor, if I could.

I wanted to first address some of the case law issues. The plaintiffs' counsel said that we have cited no cases that involved a closed quarter. The Turkcell case, which is the Southern District of New York, 202 F. Supp. 2d 8, the N2K case, which is Southern District of New York, 82 F. Supp. 2d 204. The DeMaria case, which is 318 F. 3d 170. Are all cases where the quarter was closed.

Shaw, I think as plaintiffs even pointed out, while the quarter wasn't closed, the Court assumed that the defendants actually had knowledge of the facts that were at issue. And so I don't think it's appropriate to distinguish Shaw on the basis of the fact that the quarter wasn't closed because knowledge was assumed. And I think this actually is a good way to distinguish the Children's Place case, which is a case the plaintiffs cite and rely pretty heavily on.

First off, I would note that Children's Place is a pre-Twombly case, so is has the any set of facts standard. Children's Place confirms that you can't plead fraud by hindsight. It confirms, and is a Section 11 case, it confirms that you do need to do a detailed analysis of the claims. And it contains only one real claim that I would analogize to this case. It contains one claim essentially that the prospectus reported prior year earnings, and that those reports were rendered misleading because the company already knew that its next set of earnings would be materially different or be a

significant departure. I don't think they use the words extreme departure, materially different let's say from their prior period earnings. The thing is the Children's Place court actually dismisses that claim. It dismisses that claim and says: Well, the quarter is not closed yet, and at this point, assuming that the quarter was, you'd be actually forcing them to disclose based on their projections how the quarter will close out because you don't know how it's going to close out yet, so I would call this not really analogous for this reason. It's an analogous claim, but the underlying fact that a quarter timing is different. And in this case the Court found it made a difference, unlike in Shaw.

I would say that the Castlerock case is actually much closer. In the Castlerock case, essentially the analysis the Court went through was the prospectus disclosed that the company had a certain amount of capacity in one of that -- I think it was a battery maker had a prospectus -- a sudden prospectus, it had sufficient capacity in one of its plant to increase its production. And the plaintiffs claimed: Well, yeah, but you had the ability to ramp up that production from where it was to its actual capacity, it was going to create a lot of difficulty and dislocation of the company, you didn't disclose that.

Now, the Court discusses a little bit whether that's really an implied statement, but in fact assumes that there's

an implication in the prospectus that in fact the ramp up ability is implied in the saying: We have the ability to do the production. And the Court dismisses that claim in Castlerock and the court dismisses the claim because it says: Well, they disclose in their prospectus that increasing their production may put strains and personnel resources and may put strains on a number of their resources. That's enough disclosure to let someone know there could conceivably be a problem. I think Children's Place is a different case, and I think it brings into stark contrast where it's meaningful that the quarter isn't closed.

I want to address the Adams Golf case a little bit. First off, not a 303 case. So from that prospective, knowledge isn't required. And the key point about Adams Golf, which I think is really cited by the plaintiffs for the idea that the Court shouldn't be deciding these types of issues of materiality on a motion to dismiss is the Adams Golf court actually dismisses one of the two sets of claims that are in front of it on the ground that it's immaterial as a matter of law. The other one it simply reviews the facts and says: I don't think it gets me there.

Only other thing I wanted to really do, your Honor, is -- I guess a couple of things. One, is that I think the plaintiffs actually repeated twice during the course of their arguments that their argument for why this stuff is material is

because the stock price dropped. And I think that really requires the Court to go look at the context that I put up on the board in that graph earlier. They talked about the post Q 3 announcements, the January 16th announcement and the February announcement. As far as I can tell, the January 16th announcement is just about the resignation of a chief marketing officer. There's absolutely nothing other than the bold face assertion saying the resignation of that officer had anything to do with anything that was going on at the time of the prospectus. And there's certainly no allegation that the company knew that the guy was going to resign when they put the prospectus out. So that would be essentially saying the prospectus had to predict the future, and that's simply wrong.

The fourth quarter projections. It's entirely opaque to me how fourth quarter projections that didn't come out until after the prospectus could render the prospectus misleading, even that the fourth quarter projections aren't met. Again, I just don't think there's any connection made between what they claim are corrective disclosures and what they claim was omitted.

The last piece, your Honor, is I did in a sense not directly address today what they call their other allegations of things that were missing from the complaint. They are in our papers. We're certainly not conceding, and the papers address them. But the examples that were brought I just want

to address really quickly.

She talked about internal controls. Well, she read the fact that we disclosed in the prospectus that we had a material weakness in our internal controls, that's material weaknesses, an accounting term of art. There are literally thousands, I have to believe, thousands of reporting companies in the United States who have reported material weaknesses. It's because the rules that require the reporting of them are relatively new and it's complicated for people. But I'm not really sure what they're arguing we didn't disclose, other than to say, well, really when you said you had a material weakness, it was worse than that. But the only thing that says it was worse than that, it's a very antiquated argument that leaps from a statement that we out-sourced inventory and had difficulty reconciling our inventory controls. And say, well, that really means that your problems were much worse than the material weakness you disclosed.

Again, I don't believe, and it's done more directly in the papers, I don't believe there's any connection there between what they claim the witness -- the confidential witness says. Certainly what I said before is through, that there's no connection between what any of the confidential witnesses and the source of information that they're talking about, there's no reason to think those confidential witnesses would actually have known this. But there's also no connection what the

confidential witness allegedly said and the failure to disclose something about the company's internal controls.

On the issue of, I think I did address this briefly, but on the issue of whether or not the company was continuing to spend the same amount of money on markets or was letting go marketing staff, it's, again, impossible for me to understand how you tie that to the idea that the company is somehow not -- doesn't mean it when it says it's going to continue to maintain its brand strength. There's no disclosure subsequent to their prospectus, as far as I'm aware, that the company finds its brand strength is falling apart, and it's not going to continue to try to build brand strength. It may have chosen different ways to do that which are consistent with the resources it has, and it may have chosen different ways to do that based on why they think they have to do that in the competitive environment they face. The competitive environment they face is duly disclosed. How they make a choice to construe their brand strength can't possibly mean an argument that if they continue to do so is not something subject to disclosure. That's the strategy of the company and you certainly don't put your strategy out every time you file a public document. That's all I have, unless the Court has questions of me.

THE COURT: I do not. Thank you, Mr. Gamble.

MR. GAMBLE: Thank you, your Honor.

THE COURT: Ms. Sultzstein, anything you want to add?

MS. SULTZSTEIN: Thank you, your Honor.

Really, just a quick point. The fact is that the standard here is whether or not there was an extreme departure from known trends. That's it under Rule 8. Doesn't make a difference if we're talking about Rule 8 or Rule 9, that's the standard. There was no widening loss. And substantial growth rate was disclosed. So at the end of the day, there's no claim. And those facts emerge from the registration statement. So, you know, the ambition of private plaintiffs to go out and raise claims under the Securities Law is notwithstanding. In this case, there's just no claim. That's the point.

THE COURT: All right.

MS. SULTZSTEIN: Thank you, your Honor.

THE COURT: Mr. Micheletto.

MR. MICHELETTO: Thank you, your Honor. When I was up last time, I forget to hand you a power point copy of my presentation.

THE COURT: I didn't want to stop the momentum.

MR. MICHELETTO: Often as it was.

THE COURT: You can bring it up.

MR. MICHELETTO: Thank you.

Your Honor, just a couple points. One, plaintiffs' counsel says that the cases on which we rely for purposes of Section 15 argument dealt with Section 20 of the Securities Exchange Act as opposed to Section 15. That's simply not true.

I direct your Honor specifically to the Flagg decision issued by the Southern District of New York in 2005, which is the primary case upon which we rely. Copland is another case on which we rely, which deals specifically with Section 15, as does the Sloan case, as well as Judge Wolfson's case In Tellium, also deals specifically with the Section 15 claim.

Plaintiffs' counsel also pointed to an argument contained in their opposition papers, which I pointed out in my initial argument, doesn't make its way anywhere into the complaint as support for the proposition that they have adequately alleged control by Sprint and Corvina over Virgin Mobile U.S.A.

I invite your Honor to take a look at their brief where they make this argument. It's at page 40, and it carries over a little bit onto page 41. And each of the quotations that they set forth on those pages from the Virgin Mobile registration statement talks about Sprint Nextel and the Virgin Group. Sprint Nextel and the Virgin Group together will continue to hold interests. Sprint Nextel and the Virgin Group together, Sprint Nextel and the Virgin Group. In other words -- your Honor, what they're asking you to do is to lump two distinct legal entities together for purposes of your analysis and consider them to be one person, and to say those two separate and distinct legal entities have, as one person, have control over Virgin Mobile. But that's not the

appropriate analysis. The analysis talks about sole person, not control groups of people randomly lumped together by plaintiffs in an effort to state a claim for Section 15.

I submit to your Honor that you got to look at each of Sprint Nextel and Corvina separately to determine whether each of them in their individual capacity had the requisite actual control over Virgin Mobile for purposes of Section 15. And as I indicated before, neither of them in their individual capacities had such actual control. Again, they're both alleged to have only been minority shareholders. Granted it was a 46 percent ownership interest, but it still is a non-majority, non-controlling interest in Virgin Mobile.

As for Sprint, it is alleged to have had only one director that it designated, the 8-person Virgin Mobile Board of Directors. A minority share holding interest, plus one of eight directors does not, under any stretch of the imagination, equal actual control over Virgin Mobile. It's just not there.

And as for Corvina, it's even worse because with respect to Corvina, they allege again only that Corvina had a minority interest, again roughly 46 percent, again a non-majority, non-controlling shareholding interest in Virgin Mobile U.S.A., and they don't allege that Corvina designated a single one of the directors on the Virgin Mobile board. Instead, they argued that the Virgin Group, which is alleged to own Corvina, designated three directors. But simply because

the parent corporation of Corvina designated three directors doesn't mean that Corvina, the subsidiary, had control over Virgin Mobile U.S.A.. Again, it's just not there, there's not enough facts.

Again, if your Honor would look at the very limited five paragraphs of the complaint that deal at all with Sprint and Corvina specifically, they're filled mostly again with the legal standard for what's necessary to state a claim under Section 15. They're devoid of any facts, only the minority share holding interest, and the limited participation on the board. And again those facts just aren't enough to state a Section 15 claim, and they can't and shouldn't be allowed to lump these two, again, distinct legal entities under the law together and have the court treat them as one for purposes of assessing whether or not there's control here. They should be treated separately. And when you do that, there's no control. And for this reason, as well as the other reasons I talked about this morning, and the reasons that are set forth in the brief, the Section 15 claim should be dismissed. Thank you.

THE COURT: Very well. Thank you, Mr. Micheletto.

MR. CECCHI: Judge, can I have one minute?

THE COURT: I'm counting, one.

MR. CECCHI: Thank you, Judge.

We agree with the concept that this Court must play an important gate keeper role in securities cases. And what we

say on the plaintiffs' side is the role of the Court today is more important than it ever has been. We agree with the concept that this Court should weed out non-meritorious, suspect, weak or speculative claims one hundred percent. But your role, Judge, is even more important because of the world we live in. We know the regulatory failures that have affected our economy. This case is absolutely not the type of case where it can be lumped in with those cases that the courts speak about weeding speculative claims. This is a case where the allegations are the defendant had in hand the information that we say is material and would have been material to the investing public. They had in hand all the negative information. We've outlined it in our pleading. And they just didn't tell the investing public the information they had in hand. And that's not the type of case where the law says should be weeded out. We say that case where they had the information and chose not to disclose it, is exactly the type of case where there is a role for these cases to protect the investing public because we all know what happened in this case after the IPO.

As to the argument about the control. I already mentioned Sprint Nextel. Sprint Nextel had the switch here. Its network, we submit, at the very least, that raises an issue as to when Sprint Nextell had control.

As to Mr. Micheletto's point on the other side, Virgin

Mobile, it's Richard Branson, we believe Richard Branson had a principle role in everything that went on here, or at least it's a fact issue. We dare say that Mr. Branson is not going to allow his Virgin Mobile brand to be put out to a public offering without some level of control, without control. So we would submit that that also raises a fact issue. And, Judge, we submit respectfully the motion to be dismissed in its entirety. Thank you.

THE COURT: Thank you, Mr. Cecchi.

As I indicated, counsel, at the outset, I did read the written submissions provided to the Court. I wanted to give counsel an opportunity to be heard orally here today as to the defendants' 12(b)(6) applications to dismiss plaintiffs' amended complaint in this case.

So at this juncture the Court has to look at this complaint in the -- from the standard that all allegations are considered to be true, essentially for leading purposes. And while there have been a number of arguments raised by defense counsel that this is really a fraud case, and therefore it should be pled with more particularity and more specificity. What has been clearly indicated by the plaintiffs, and the Court has to accept it as true, that this is not a fraud case. And there have been a number of arguments set forth here today that goes toward factual arguments which go towards what's going to bear itself out during the course of the discovery,

which we don't know what's going to happen at this point because there has been no discovery. And so when the Court looks at this from the Twombly prospective of whether the pleadings set forth plausible allegations, and whether the defendants are on notice of what's being alleged against them, the complaints in its amended state clearly does that. And so I don't have any basis upon which to grant the motions to dismiss. I'm not suggesting to you that there are not some claims that are suspect in terms of the strength and ultimately in a summary judgment scenario may in fact go by the wayside, but that's not what we're here for today. And as it relates to specifically the claims for a dismissal by the Sprint and Corvina defendants, under the Section 15 aspect of the act, there is at this particular point -- these are issues of fact. I mean, it's an issue of fact as to what the control was, how much they control, what did they do. And the Court can't reach that conclusion as to the Section 11 claims as it relates to the other defendants and whether the omissions were material omissions. At this stage I'm not suggesting any ruling that these were material omissions, I don't know. If they do bear themselves out to be accurate based on plaintiffs allegations, it's reasonably understandable that it could in fact have been material and therefore affected the stock. But it's not only the -- the third quarter of 2007 that's at issue, it's a number of other things that are set forth in the complaint. I think

it's certainly set forth with enough information to give defendants notice of what the claims are, notice of where these confidential witnesses come from and what their positions were, and discovery itself will bear itself out as to whether these are claims that stand from a summary judgment prospective. But the motions to dismiss pursuant to 12(b)(6) are going to be denied at this point.

I do think the complaint is sufficient and satisfactory in its allegations, and I don't have a basis at this point, in this Court's opinion, to dismiss the complaint at this juncture. I will just ask, I believe counsel submitted -- I don't have them out here with me. If we need an order, we'll reach out to counsel as necessary. Thank you for the briefing, and for the enlightenment for the Court just in terms of -- just the history of this whole thing. So the case will proceed, it will go through discovery, and we will monitor it closely to see at what point summary judgment will be appropriate because I'm sure we'll be back. Okay?

MR. CECCHI: Thank you, Judge. Have a great afternoon

MR. GAMBLE: Your Honor, could I ask that we, in trying to coordinate the case into a going forward basis, that the Court allow us to sit with all the defense counsel and plaintiffs counsel and work out a schedule for discovery and various aspects of the case that makes sense, and we'll submit that to the Court. And if you can give us maybe ten days to do

that?

THE COURT: I think that's fine. We will do it, Mr. Gamble. Judge Arleo will actually be the magistrate judge assigned, and she will coordinate all discovery. I'm sure she will not have an objection if you agree. She knows how I work, I like to move things. Don't give me 2012, okay, anywhere in that document. But I think it's absolutely appropriate that you meet and confer and try to set forth some type of schedule.

MR. GAMBLE: Thank you.

THE COURT: But she'll get in touch with you in terms of scheduling and when that conference will be conducted. Okay? And I'll sort of give her a heads up we're done here and she will proceed and schedule that.

MR. GAMBLE: Thank you, Judge.

THE COURT: Thank you, all.

MR. GREENBAUM: Thank you.

(Matter concluded)